Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02()-11 OF 2011(W), 02()-12 OF 2011(W) AND 02()-13 OF 2011(W)
ZULKEFLI CJ (MALAYA), MOHD GHAZALI AND JAMES FOONG FCJJ
5 JANUARY 2012

Companies and Corporations — Liquidators — Application for directions — Application for directions from court — Whether directions sought were bona fide directions — Whether directions given by High Court were in the nature of advice — Whether directions were appealable — Companies Act 1965 s 237(3) — Courts of Judicature Act s 67(1)

Companies and Corporations — Liquidators — Removal of — Action by majority contributories — Leave granted to proceed against liquidators — Appeal against order granting leave — Whether company had suffered pecuniary loss — Whether contributories had cause of action — Whether claims of majority contributories had merit — Whether liquidators had discretion to extend time of offers and also to entertain any offers — Whether liquidators had acted in best interest of company — Whether liquidators as officers of court were expected to abide by standards of judges — Whether there was conflict of interest — Whether liquidators had accepted illegal gratification which tainted agreement for sale of company shares

When the High Court ordered Kian Joo Holdings Sdn Bhd ('the company') to be wound up, Ng Kim Tuck and Ooi Woon Chee ('the liquidators') were appointed as liquidators of the company. The liquidators put forward two methods of distributing the assets of the company, namely, the sale of the 153,868,617 ordinary shares that the company owned in Kian Joo Can Factory Bhd ('KJCF shares'), or a pro-rated distribution of the KJCF shares among the existing 27 contributories of the company. The majority contributories of the company led by Dato' See Teow Chuan ('Dato' See') voted in favour of the sale of the KJCF shares while the minority voted against the sale. After the first share sale agreement to sell the KJCF shares was aborted, the liquidators put up all the KJCF shares for sale by open public tender. Although the liquidators received three offers for the purchase of KJCF shares, they were not satisfied and extended the deadline and requested all offerors for improved offers so as to obtain the best possible price. Upon receiving revised offers from two offerors, ie Can-One International Sdn Bhd ('Can-One') and Gold Pomelo Sdn Bhd, the private vehicle of Dato' See, the liquidators met with Dato' See and his son for a discussion. According to Dato' See and his son, the liquidators had requested for a secret meeting for the purpose of soliciting gratification

from Dato' See to sell the shares to Gold Pomelo. Thereafter, the liquidators accepted Can-One's offer to purchase the KJCF shares, which was the highest offer as of the deadline, and the contributories were duly informed of the award of the sale to Can-One. The minority contributories objected to the sale on the grounds that the KJCF shares ought to be distributed in specie while the majority contributories made the allegation that the acceptance of the Can-One offer by the liquidators was tainted with fraud and corrupt practice and thus null and void. When the liquidators denied the allegations, the majority contributories commenced a civil suit against the liquidators for, inter alia, alleged misconduct in the tender of the KJCF shares and the eventual award of the sale to Can-One. However, this application was dismissed because it was commenced without obtaining the leave of the court. The majority contributories thereafter filed an application for leave to proceed against the liquidators ('the leave application') but the High Court found in favour of the liquidators on the leave application. At the same time the liquidators filed an application for directions as to whether to complete the sale to Can-One ('the directions application'). The High Court directed the completion of the sale to Can-One. The contributories appealed to the Court of Appeal against both those decisions. The Court of Appeal reversed the decision of the High Court. It granted leave to the majority contributories to proceed with the action against the liquidators, dismissed the liquidators' directions application and set aside the direction to complete the sale of the KJCF shares to Can-One. The liquidators obtained the leave of this court to proceed with the present appeals against the decision of the Court of Appeal in respect of both the leave application and the directions application.

Held, allowing the appeals with costs:

(1) This court agreed with the decision of the High Court in respect of the leave application. It was settled law that in order for leave to be granted to proceed with the suit against the liquidators the majority contributories would need to prove pecuniary loss to the company. However, no pecuniary loss had been shown by the liquidators accepting the Can-One's offer, which was the highest offer received by the company. As such, the Court of Appeal had erred in granting the majority contributories leave to proceed with their action against the liquidators. In any event there was no cause of action vested in the majority contributories. Since any loss suffered was in fact suffered by the company, the proper plaintiff was the company (see para 10–14).

(2) In order to succeed in the leave application, the contributories had to make out a prima facie case. The High Court had rightly embarked on an evaluation of the evidence and had correctly held that the claims of the majority contributories had no merit. The Court of Appeal erred in concluding that there were yet questions to be tried as to the validity of the offer from Can-One. The liquidators had the discretion to extend the

time of the offers and also to entertain any offers. This court found that there was no bad faith on the part of the liquidators in exercising their discretion to accept Can-One's offer. It was in the best interest of the company and the contributories to accept Can-One's offer (see paras 15, 17–20 & 22).

(3) The contributories' complaint of conflict of interest on the part of the liquidators, who were partners of KPMG (a firm), for accepting an offer from Can-One, audit clients of KPMG, was without merit. The guiding principle is that the liquidator must be independent and be seen to be independent. Commercial reality dictates that the existence of such a relationship by itself should not disqualify liquidators or their audit clients. There was no express prohibition by the winding up legislations that Can-One was precluded from participating in the sale (see paras 23, 25 & 29).

(4) The Court of Appeal had erred in holding that liquidators as officers of the court were expected to abide by the standards as judges and thus could not hold bids outside their offices. In exercising a power of sale liquidators did not exercise judicial or quasi-judicial functions. Instead, the liquidators were required to make business decisions on the benefits and burdens of the sale and to obtain the highest possible price. Further, it would be to ignore commercial reality to impose upon a liquidator the standards of a judge when selling assets (see paras 34 & 37).

(5) It was found that no bribe was paid. The complaint of the illegal gratification was only made after the announcement that Can-One was awarded the sale. In any case, in the absence of the solicitation tainting the Can-One agreement, the allegation even if true could have no effect on the validity of the said agreement. The High Court had rightly held that the allegation of solicitation was devoid of merit and the Court of Appeal had erred in holding that serious questions had been raised about the illegal gratification (see paras 38 & 42).

(6) The liquidators' application for directions ought to be viewed against the factual matrix of the case whereby for 15 years after the company had been wound up, the liquidators had been impeded from completing the winding-up of the company by proceedings commenced by the contributories. The directions sought in the present case were bona fide directions requested for by the liquidators. Further the directions given by the High Court under s 237(3) of the Companies Act were in the nature of advice and were accordingly not a judgment or order within the scope of s 67(1) of the Courts of Judicature Act 1964. As such they were non-appealable (see para 51–52).

(7) The majority contributories were ordered to pay a sum of RM300,000 as

costs to the liquidators, while the minority contributories were ordered to pay a sum of RM200,000 as costs (see para 56).

[Bahasa Malaysia summary

Apabila Mahkamah Tinggi memerintahkan Kian Joo Holdings Sdn Bhd ('syarikat') digulungkan, Ng Kim Tuck dan Ooi Woon Chee ('pelikuidasi-pelikuidasi') dilantik sebagai pelikuidasi syarikat. Pelikuidasi-pelikuidasi mengemukakan dua cara pembahagian aset-aset syarikat iaitu, dengan jualan 153,868,617 saham biasa yang dimiliki syarikat dalam Kian Joo Can Factory Bhd ('saham KJCF'), atau pembahagian secara pro-rata saham KJCF di antara 27 penyumbang semasa syarikat. Penyumbang majoriti syarikat diketuai oleh Dato' See Teow Chuan ('Dato' See') mengundi memihak kepada penjualan saham KJCF sementara minoriti mengundi menentang jualan. Selepas perjanjian jualan saham pertama untuk menjual saham KJCF digugurkan, pelikuidasi-pelikuidasi meletakkan kesemua saham KJCF untuk jualan secara tender umum. Walaupun pelikuidasi-pelikuidasi menerima tiga tawaran untuk pembelian saham KJCF, mereka tidak berpuas hati dan melanjutkan tarikh tutup dan meminta kesemua penawar untuk tawaran yang lebih baik untuk memperoleh harga yang sebaik mungkin. Selepas menerima tawaran yang disemak semula daripada dua penawar, iaitu Can-One International Sdn Bhd ('Can-One') dan Gold Pomelo Sdn Bhd, milik persendirian Dato' See, pelikuidasi-pelikuidasi berjumpa dengan Dato' See dan anak lelakinya bertujuan untuk perbincangan. Menurut Dato' See dan anak lelakinya, pelikuidasi-pelikuidasi meminta untuk mesyuarat rahsia bertujuan untuk meminta suapan daripada Dato' See untuk menjual saham-saham tersebut kepada Gold Pomelo. Kemudian pelikuidasi-pelikuidasi menerima tawaran Can-One untuk membeli saham KJCF, yang merupakan tawaran tertinggi setakat tarikh tutup, dan penyumbang-penyumbang diberitahu mengenai award jualan tersebut kepada Can-One. Penyumbang-penyumbang minoriti menentang jualan atas alasan bahawa saham KJCF sepatutnya dibahagikan 'in specie' sementara penyumbang majoriti mendakwa bahawa penerimaan tawaran Can-One oleh pelikuidasi dicemari oleh fraud dan amalan korup dan dengan itu batal dan tidak sah. Apabila pelikuidasi-pelikuidasi menafikan dakwaan tersebut, penyumbang majoriti memulakan guaman sivil terhadap pelikuidasi-pelikuidasi tersebut untuk, antara lain, salah laku yang didakwa di dalam tender saham KJCF dan pengawardan kemudiannya untuk jualan kepada Can-One. Walau bagaimanapun, permohonan ini ditolak kerana ia dimulakan tanpa mendapatkan kebenaran mahkamah. Penyumbang majoriti kemudiannya memfailkan permohonan untuk kebenaran meneruskan terhadap pelikuidasi-pelikuidasi ('permohonan kebenaran tersebut') tetapi Mahkamah Tinggi membuat penemuan memihak kepada pelikuidasi-pelikuidasi atas permohonan kebenaran. Pada masa yang sama pelikuidasi-pelikuidasi memfailkan permohonan untuk arahan sama ada untuk menyelesaikan jualan kepada Can-One ('permohonan untuk arahan').

A Mahkamah Tinggi mengarahkan penyelesaian jualan kepada Can-One. Penyumbang-penyumbang merayu ke Mahkamah Rayuan terhadap kedua-dua keputusan tersebut. Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi. Ia membenarkan kebenaran untuk penyumbang majoriti meneruskan dengan tindakan terhadap pelikuidasi-pelikuidasi, menolak B permohonan arahan pelikuidasi-pelikuidasi dan mengenepikan arahan untuk menyelesaikan jualan saham KJCF kepada Can-One. Pelikuidasi-pelikuidasi memperoleh kebenaran mahkamah ini untuk meneruskan dengan rayuan-rayuan ini terhadap keputusan Mahkamah Rayuan berkaitan dengan kedua-dua permohonan untuk kebenaran dan permohonan untuk arahan. C

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Mahkamah ini bersetuju dengan keputusan Mahkamah Tinggi berkaitan dengan permohonan kebenaran. Adalah undang-undang matan bahawa D bagi kebenaran diberikan untuk meneruskan dengan guaman terhadap pelikuidasi-pelikuidasi penyumbang majoriti perlu membuktikan kerugian kewangan kepada syarikat. Walau bagaimanapun, tidak ada kerugian kewangan yang telah ditunjukkan oleh pelikuidasi-pelikuidasi menerima tawaran Can-One, yang merupakan tawaran tertinggi yang E diterima oleh syarikat. Oleh demikian Mahkamah Rayuan terkhilaf dalam memberikan penyumbang majoriti kebenaran untuk meneruskan dengan tindakan terhadap pelikuidasi-pelikuidasi. Walau apa pun, tidak ada kausa tindakan terletak dalam penyumbang majoriti. Oleh sebab apa-apa kerugian yang dialami adalah sebenarnya dialami oleh syarikat, F plaintif yang wajar adalah syarikat (lihat perenggan 10–14).

(2) Untuk berjaya dalam permohonan kebenaran, penyumbang-penyumbang perlu membuktikan kes prima facie. Mahkamah Tinggi telah dengan betul membuat penilaian keterangan dan telah secara betul memutuskan bahawa tuntutan penyumbang G majoriti tidak bermerit. Mahkamah Rayuan terkhilaf dalam memutuskan bahawa tidak ada persoalan untuk dibicarakan mengenai kesahan tawaran daripada Can-One. Pelikuidasi-pelikuidasi mempunyai budi bicara untuk melanjutkan masa tawaran dan juga untuk melayan apa-apa tawaran. Mahkamah ini mendapati bahawa tidak ada niat jahat H pada pihak pelikuidasi dalam melaksanakan budi bicara mereka untuk menerima tawaran Can-One. Ia adalah dalam kepentingan syarikat dan penyumbang-penyumbang untuk menerima tawaran Can-One (lihat perenggan 15, 17–20 & 22).

I (3) Aduan penyumbang-penyumbang mengenai konflik kepentingan pada pihak pelikuidasi-pelikuidasi, yang merupakan rakan kongsi KPMG (sebuah firma), kerana menerima tawaran Can-One, pelanggan audit KPMG, adalah tanpa merit. Prinsip panduan adalah bahawa pelikuidasi-pelikuidasi sepatutnya bebas dan kelihatan bebas. Realiti

komersial menyatakan bahawa kewujudan perhubungan sedemikian dengan sedirinya tidak sepatutnya menyingkirkan pelikuidasi-pelikuidasi atau pelanggan audit mereka. Tidak ada larangan secara langsung oleh perundangan penggulungan bahawa Can-One dihalang daripada mengambil bahagian dalam jualan (lihat perenggan 23, 25 & 29).

(4) Mahkamah Rayuan telah terkhilaf dalam memutuskan bahawa pelikuidasi-pelikuidasi sebagai pegawai-pegawai mahkamah diharapkan mematuhi standard seperti hakim-hakim dan dengan itu tidak boleh membuat bidaan di luar pejabat mereka. Dalam melaksanakan kuasa jualan, pelikuidasi-pelikuidasi tidak melaksanakan fungsi kehakiman atau separa kehakiman. Sebaliknya, pelikuidasi-pelikuidasi diperlukan untuk membuat keputusan perniagaan untuk faedah dan beban jualan dan memperoleh harga yang setinggi mungkin. Selanjutnya, adalah penafian realiti komersial untuk meletakkan atas pelikuidasi-pelikuidasi standard hakim apabila menjual aset-aset (lihat perenggan 34 & 37).

(5) Didapati tidak ada rasuah yang diberikan. Aduan tentang suapan haram hanya dibuat selepas pengumuman bahawa Can-One diawardkan jualan. Walau apa pun, dalam ketiadaan permintaan yang mencemarkan perjanjian Can-One, dakwaan tersebut, jika pun benar tidak mempunyai kesan atas kesahan perjanjian tersebut. Mahkamah Tinggi telah dengan betul memutuskan bahawa dakwaan meminta suapan adalah tidak bermerit dan Mahkamah Rayuan telah terkhilaf dalam memutuskan bahawa persoalan serius telah dibangkitkan mengenai suapan haram tersebut (lihat perenggan 38 & 42).

(6) Permohonan pelikuidasi-pelikuidasi perlu dilihat bertentangan dengn matriks fakta kes tersebut di mana bagi 15 tahun selepas penggulungan syarikat, pelikuidasi-pelikuidasi telah dihalang daripada menyelesaikan penggulungan syarikat dengan prosiding-prosiding yang dimulakan oleh penyumbang-penyumbang. Arahan yang dipohon di dalam kes ini adalah arahan bona fide yang diminta oleh pelikuidasi-pelikuidasi. Selanjutnya, arahan yang diberikan oleh Mahkamah Tinggi di bawah s 237(3) Akta Syarikat adalah bersifat sebagai nasihat dan dengan itu bukan penghakiman atau perintah dalam rangkuman s 67(1) Akta Mahkamah Kehakiman 1964. Oleh itu ia tidak boleh dirayu (lihat perenggan 51–52).

(7) Penyumbang majoriti diperintahkan membayar jumlah sebanyak RM300,000 sebagai kos kepada pelikuidasi-pelikuidasi, sementara penyumbang minoriti diperintahkan membayar RM200,000 sebagai kos (lihat perenggan 56).]

Notes

For a case on application for directions, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 469.

A For a case on removal of liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 473.

Cases referred to

Aberdeen Rail Co v Blaikie Brothers (1843–60) All ER Rep 249, HL (distd)
B *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516, HC (refd)
Advance Housing Pty Ltd (in liq) v Newcastle Classic Development Pty Ltd (1994) 14 ACSR 230, SC (refd)
Attorney General v Blake [2001] AC 268, HL (distd)
C *Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14 (refd)
Bovis Lend Lease Pty Ltd v Wily (2003) 45 ACSR 612, SC (refd)
Cape v Redarb Pty Ltd (1992) 8 ACSR 67, SC (refd)
Chevron Furnishers Pty Ltd, Re (1993) 12 ACSR 565, CA (refd)
Christianos v Aloridge (1995) 13 ACLC 1851, FC (refd)
D *Cobrico Development Inc v Tucker Industries Inc* 2000 ABQB 766 (refd)
House Property and Investment Co Ltd, Re [1954] Ch 567 (refd)
Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222, HL (refd)
JW Murphy & PC Allen, Re (1996) 19 ACSR 569, SC (refd)
Mamone and another v Pantzer (2001) 36 ACSR 743, SC (refd)
E *Mineral Securities Australia, Re* [1973] 2 NSWLR 207 (refd)
Moody v Cox and Hatt [1917] 2 Ch 71, CA (refd)
Pongrass Group Operations Pty Ltd v Lowerpinems Pty Ltd (1994) 15 ACSR 341, FC (refd)
Ramsey v Leonard Curtis (a firm) [1999] All ER (D) 891, CA (refd)
F *Sanderson v Classic Car Insurances Pty Ltd* (1986) 4 ACLC 1141, SC (refd)
Sankey Furniture Ltd ex parte Harding, Re [1995] 2 BCLC 594 (refd)
Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd [2005] 2 MLJ 74; [2004] 8 CLJ 584, HC (refd)
Security Provident Fund Limited (in liq) Rodger v Gourlay, Re (1984) 2 ACLC
G 594, SC (refd)
Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq), Re (1989) 7 ACLC 1270 (refd)
Statewide Investments Ltd (in liq), Re (1981) 6 ACLR 2651, SC (refd)
Timberland, Re (1979) 4 ACLR 259, SC (refd)
H *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 1 LNS 320, HC (refd)
Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)
I

Legislation referred to

Companies Act 1965 ss 236 (2)(i), 273(3)
Companies (Winding-Up) Rules r 144
Companies (Queensland) Code Rules [AUS] s 379(3)

Courts of Judicature Act 1964 s 67, 67(1)
Rules of the Federal Court 1995 r 57

Appeal from: Company Winding-up No D24–28–294 of 1994 (High Court, Kuala Lumpur)

Cecil Abraham (S Suhendran, Sunil Abraham and SY Soh with him) (Kadir, Andri & Partners) for the appellants in Civil Appeal Nos 02()-11 of 2011(W) and 02()-12 of 2011(W).
Porres P Royan (T Sudhar with him) (Shook Lin & Bok) for the appellants Civil Appeal No 02()-13 of 2011(W).
VK Lingam (R Thayalan and VK Lashmi with him) (VK Lingam & Co) for the first to 14th respondents in Civil Appeal Nos 02()-11 of 2011(W) and 02()-12 of 2011(W).
Izabella Da Silva (Siow Thian Ern and Benjamin Dawson with her) (Iza Ng Yeoh & Kit) for the 15th to 27th respondents Civil Appeal Nos 02()-11 of 2011(W), 02()-12 of 2011(W) and 02()-13 of 2011(W).

Zulkefli CJ (Malaya):

INTRODUCTION

[1] There are three appeals before this court; namely Civil Appeal Nos 02–11 of 2011(W), 02–12 of 2011(W) and 02–13 of 2011(W) arising from two main applications filed before the High Court by the respective parties. The first application was filed by the majority contributories of Kian Joo Holdings Sdn Bhd (in liquidation) ('the company') against the liquidators of the company for leave to proceed with legal proceedings ('the leave application') against the liquidators for alleged misconduct in a tender of the assets and eventual award to Can-One International Sdn Bhd ('Can-One'). The second application was filed by the liquidators for directions as to whether to complete the sale to Can-One ('the directions application'). There were a number of other applications by other interested parties, but those, as explained later in this judgment were corollary to these main applications.

[2] The appellants ('the liquidators') in Civil Appeal Nos 02–11 of 2011(W) and 02–12 of 2011(W) are the court appointed liquidators of the company. The company with the consent of the shareholders was wound up by an order dated 30 January 1996. The appellant in Civil Appeal No 02–13 of 2011(W) is Can-One.

[3] On 25 September 2009 the learned judicial commissioner of the High Court found in favour of the liquidators on the leave application whilst under the directions application, the learned judicial commissioner directed the completion of the sale to Can-One. The decision of the High Court was reversed by the Court of Appeal.

[4] On 21 February 2011 the liquidators were granted leave to appeal to the Federal Court in respect of the both the leave application and the directions application. Pursuant to such leave, two appeals were filed: 02()-11 of 2011(W) in relation to the leave application and 02()-12 of 2011(W) in relation to the directions application. Can-One also obtained leave and has filed an appeal to the Federal Court vide Civil Appeal No 02–13 of 2011(W).

[5] This court had dismissed the appeal by Can-One vide Civil Appeal No 02–13 of 2011(W) on 13 July 2011 without hearing the merits of the appeal upon application made by the respondents. The appeal by Can-One was dismissed on the ground that there were material defects in the memorandum of appeal filed by Can-One and hence a breach of the substantial provisions under r 57 of the Rules of the Federal Court 1995.

BACKGROUND FACTS

[6] The relevant background facts of the matter on which all the applications are premised upon which the learned judicial commissioner of the High Court arrived at her decision are as follows:

(1) On September 1994 the first to 11th petitioners (representing the minority contributories) filed before the High Court a petition to wind up the Kian Joo Holdings Sdn Bhd ('the company');

(2) by a consent order dated 30 January 1996 the High Court ordered that the company be wound up pursuant to s 218(f) and (i) of the Companies Act 1965 ('the Act'). Abdul Jabbar bin Abdul Majid and Ng Kim Tuck were appointed as liquidators of the company to act jointly and severally. By order of court dated 2 October 2007, Ooi Woon Chee replaced Abdul Jabbar bin Abdul Majid. Therefore Ng Kim Tuck and Ooi Woon Chee are the current liquidators of the company;

(3) there are 27 contributories of the company. Broadly they can be divided into two factions. The majority contributories representing 52% in value of the shares of the company is led by Dato' See Teow Chuan ('Dato' See');

(4) the minority contributories representing 48% in value of the shares in the company is led by Dato' Anthony See Teow Guan ('Dato' Anthony');

(5) the company owns 153,868,617 ordinary shares of RM0.25 each ('KJCFB shares') in Kian Joo Can Factory Bhd ('KJCFB') representing 34.46% of the total issued and paid up share capital of KJCFB;

(6) since the commencement of the winding up proceedings, the liquidators have called for meetings of the contributories to ascertain their views on the method of distributing assets. The two factions put forward two differing views. The majority contributories favoured the sale of the KJCFB shares, while the minority contributories preferred a distribution in specie (a pro-rated distribution among the existing contributories) of the KJCFB shares;

(7) at meetings held on 12 July 1996, 8 December 1999 and 10 July 2008 respectively, the majority contributories voted in favour of the sale of the KJCFB shares while the minority voted against the sale;

(8) as a consequence of the view expressed at these meetings, the last of which was in July 2008, the liquidators decided to, and took steps to sell the KJCFB shares. The liquidators' decision was challenged by the minority contributories by the filing of legal proceedings which were resolved in 2007 when the Court of Appeal dismissed the application by the minority contributories which sought to revise the decision of the Liquidators to sell the KJCFB shares;

(9) in June 2007 the liquidators put up the KJCFB shares for sale. Based on Dato' See's offer of RM2.08 per share, which was the highest offer received, the sale was awarded to Dato' See. A share sale agreement was entered into for the sale of 142,133,692 KJCFB shares representing 32% of the issued and paid up share capital of KJCFB. It is not in dispute that the said agreement was aborted. The reason was the price, which was high in the context of the then prevailing share market condition;

(10) as the sale had been aborted, the liquidators again convened the contributories meeting in July 2008 to ascertain once again the wishes of the contributories. The majority contributories again voted in favour of the sale of the KJCFB shares;

(11) accordingly in August 2008 the liquidators put up all the KJCFB shares for sale ('the 2008 sale'). Notwithstanding Dato' See's failure to complete in the earlier sale, he was allowed to participate in the 2008 sale. The sale of the shares was by open public tender;

(12) the liquidators placed advertisements in the newspapers in August 2008 inviting interested parties to register their interest in the shares. They received expressions of interest from several parties including one Gold Pomelo Sdn Bhd, the private vehicle of Dato' See and a third party, Can-One;

(13) the liquidators then provided to these parties the terms on which the liquidators agreed to supply information relating to the proposed sale of the shares ('the confidentiality agreement'). Upon acceptance of the terms of the confidentiality agreement the liquidators set out the procedures to be followed by the parties to submit the offer of the purchase of the shares. This memorandum provided, inter alia, that the offers by the parties should be received by the liquidators by 5.30pm on Tuesday 28 October 2008 and that the offer was to be opened for acceptance for a period of 90 days from the said date;

(14) the liquidators varied the deadline for the submission of the offer to 5.30pm on Thursday 27 November 2008 but requested that such offers be opened for acceptance for a period of 60 days from such deadline. This kept the conclusion of the tender process within the three month period initially stated. The liquidators maintain that this extension to 27 November 2008 was made to allow offerors to secure financing and submit the best possible offers. No-one objected to this extension of the deadline;

(15) on 27 November 2008 three offers for the purchase of the KJCFB shares were

received. According to the liquidators all these offers were opened and witnessed by the liquidators' solicitors. Dato' See was advised that three offers had been received on the said date;

(16) Can-One's offer was to acquire all the assets and liabilities of KJCFB for RM666,251,679 which was equivalent to RM1.50 per KJCFB share. Dato' See's offer through his private vehicle, Gold Pomelo was for the purchase of 142,200,000 KJCFB shares at RM1.38 per share. And the third offeror offered to acquire 131,424,000 KJCFB shares at RM1.20 per share;

(17) the liquidators were not satisfied with the offers and requested all offerors for improved offers to obtain the best possible price by 19 January 2009. In this context it is relevant that the liquidators had the absolute discretion under terms of the sale documents and s 2 of the information memorandum ('memorandum') to extend time and to change or terminate the procedures for the 2008 sale, without advance notice as well as the right to deal with one or more selected persons and or to exclude any persons from the sale process under s 6 of the memorandum. Finally the liquidators had absolute discretion to evaluate any offer and to reject any or all offers. They were also under no obligation to accept any particular offer whether or not the offer proposed the highest purchase price under s 6 of the memorandum;

(18) on 19 January 2009, the extended deadline, the liquidators received improved offers, the opening of which was witnessed by the liquidators' solicitors. Can-One improved their offer by giving two options, namely to acquire the assets and liabilities of KJCFB for RM732.9m which is equivalent to RM1.65 per share and a second option for the purchase of 153,868,617 KJCFB shares at RM1.65 per share. Dato' See through Gold Pomelo revised his offer for 133,300,000 KJCFB shares at RM1.48 per share;

(19) on 23 January 2009 at 9am a meeting was held between Dato' See, his son, one Jason See and See Teow Koon to discuss Gold Pomelo's revised offer. At the meeting the Liquidators requested for an extension of Gold Pomelo's offer up to 20 February 2009. A letter to that effect was issued to Gold Pomelo. In response, Gold Pomelo acting through Dato' See, agreed to an extension up to 6 February 2009. Dato' See also said that he could increase his offer and asked the liquidators to advise him on an acceptable price;

(20) the liquidators maintained that arising from the internal discussion it was agreed that Gold Pomelo would be given the opportunity to meet a required price of RM1.68 per share by 25 January 2009. This, according to the liquidators would provide the certainty of a cash sale of the shares to Gold Pomelo as opposed to the options offered by Can-One;

(21) pursuant to this, the liquidators and their agents met up with Dato' See, See Teow Koon and Jason See at 4pm the same day, ie 23 January 2009 which was a Friday. Datuk KL Rekhraj, the legal advisor of Gold Pomelo and Mr Piers Willis from Rothschild Malaysia Sdn Bhd, their financial advisor were also present at the meeting. The liquidator, Ooi Woon Chee ('Ooi') maintained that he advised Dato' See that if Gold Pomelo could increase its offer price to RM1.68 per share for the 133,300,000 KJCFB shares, the offer would be accepted immediately;

(22) there are two versions with respect to the initiation of the meeting that occurred

the following day, ie 24 January 2009. Jason See, the son of Dato' See claimed that one of the liquidators, Ooi invited him for a private meeting at 7pm on Saturday 24 January 2009 at Restaurant Devi's Comer in Taman Tun Dr Ismail, Kuala Lumpur. Ooi maintained that it was Jason See who called him on the afternoon of 24 January 2009, a Saturday, for a meeting as Jason See wished to pass a letter to him personally;

(23) Jason See alleged that at this meeting on 24 January 2009, Ooi had solicited that Jason See and his father set aside substantial cash consideration to reward Ooi's efforts to ensure that Gold Pomelo would succeed in its bid to acquire the shares. According to Jason See, Ooi told him that the substantial cash payment to Ooi would provide for Ooi's retirement and for his children's overseas tertiary education. Additionally, Jason See affirmed that Ooi had assured him that if such monies were paid to him, Ooi would reciprocate by awarding the bid to Gold Pomelo. Ooi is alleged to have stated that he would accept a reduced offer price of between RM1.50 to RM1.58 per share instead of the previous offer of RM2.08 made by Dato' See during the 2007 Sale. Ooi claimed to be 'protected' as he was an officer of the court and the other bidders and contributories would have no recourse against him as he could justify his decision, in return for the illegal gratification he sought;

(24) Jason See maintained that he categorically refused to give any such illegal gratification to Ooi. He claimed that he told Ooi that the public tender was being carried out unprofessionally and unethically because confidential and price sensitive information was being leaked out to the other bidders. He also complained that the other bidders were being afforded opportunity to improve their offers. Jason See contended that he reminded Ooi to carry out the open tender process impartially and fairly. Finally Jason See contended that Ooi gave him his mobile phone number and an open invitation to Ooi's residence to discuss the bids and the illegal gratification sought;

(25) Jason See contended that the same subject matter was discussed again at another meeting between himself and the liquidator, Ooi at 9.30am on Monday, 2 February 2009 at McDonald's One Utama, Bandar Utama. These issues comprise the crux of the 'impropriety' allegations leveled against the liquidator, Ooi;

(26) the liquidator, Ooi contended otherwise. He maintained that the first meeting on 24 January 2009, a Saturday was initiated when Jason See called him in the afternoon and claimed that he wished to pass a letter to him personally. The letter was from Gold Pomelo, stating that it was unable to take up the offer of RM1.68 per share made at the meeting on 23 January 2009. The letter referred to the meeting on 23 January at the liquidator's office and the presence of Gold Pomelo's advisers. The letter thanked the liquidator, Ooi for his 'preferential offer to us to buy 30.01% stake KJCFB at RM1.68 per share'. The letter concluded by stating that Gold Pomelo was unable to take up the offer. The letter on the face of it showed an acknowledgement of receipt with the words 'Rec'd 24/1/09' and the time is set out therein as '7 p.m.';

(27) the second meeting between Ooi and Jason See took place at 9.30am on Monday 2 February 2009. Jason See maintained that the events set out at the first meeting

recurred. In short he maintained that solicitation of illegal gratification took place twice, once on 24 January 2009 and again on 2 February 2009;

(28) the liquidator Ooi however contended that it was Jason See who again contacted him and asked to see him outside his office, as there was something urgent which he needed to speak about. Ooi agreed to do so, provided the meeting was at a location nearby his offices. At this meeting, according to Ooi, Jason See told him that Dato' See was considering making a revised offer of RM1.55 per share through Gold Pomelo;

(29) On 6 February 2009, four days later, Jason See asked for a further meeting and at that meeting passed to the liquidator Ooi a letter from Gold Pomelo which increased their offer price to RM1.55 per share for 133,300,000 KJCFB shares, provided the liquidator accepted such offer on or before 10 February 2009;

(30) the liquidator Ooi responded by a letter dated 10 February 2009 to Gold Pomelo seeking its agreement for the revised offer of RM1.55 per share to remain valid until 20 February 2009. Gold Pomelo agreed to the extension of the validity of the offer until 20 February 2009;

(31) On 20 February 2009 the liquidators received confirmation from Can-One stating that it would drop the first option it had proposed and confirming its offer for the acquisition of 146,131,500 KJCFB shares at RM1.65 per share as per its second option;

(32) the liquidators accepted Can-One's offer which was the highest offer as of the deadline. The total consideration payable under Can-One's offer was RM241,116,975 while the total consideration payable under Gold Pomelo's offer was RM206,615,000. The difference in consideration between the two bids was approximately RM34.5m;

(33) by letter dated 23 February 2009 the contributories were informed of the award of the sale to Can-One. Gold Pomelo's revised offer of RM1.55 per share was rejected on the same day;

(34) on 26 February 2009, the solicitors acting for the minority contributories objected to the sale of KJCFB shares as they had taken the position consistently that the KJCFB shares ought to be distributed in specie;

(35) on 2 March 2009 and 3 March 2009 respectively the majority contributories made the allegation that the acceptance of the Can-One offer by the liquidators was tainted with fraud and corrupt practice and consequently illegal, null and void. Vide letters dated 4 March and 23 March 2009 the liquidators replied to these letters denying the allegations;

(36) on 18 March 2009 the majority contributories commenced Civil Suit No D-22–505 of 2009 ('the 505 suit') against, inter alia, the liquidators alleging fraud and corrupt practice;

(37) a sale agreement dated 23 March 2009 was entered into between the company and Can-One for the sale of 146,131,500 KJCFB shares at RM1.65 per share for an aggregate sale price of RM241,116,975 ('Can-One agreement'). The Can-One agreement provides, inter alia, that Can-One may at any time give notice of termination to the company in the event that the company fails,

neglects or refuses to complete the sale in accordance with the provisions of the agreement. In such event the company must within seven days refund the deposit together with interest up to a maximum aggregate sum of RM300,000. The only remedy of the parties is as set out in the agreement and neither party shall be entitled to, and will not take any action in law to compel the other party by way of specific performance to complete the sale or purchase of the shares. Neither will either party be entitled to, nor will either party take any action for any loss or damage;

(38) on 6 April 2009, the majority contributories, led by Dato' See filed two notices of motion seeking: (a) an order to remove the liquidators; and (b) an order that the majority contributories be granted leave to proceed with the 505 Suit which had been commenced without obtaining leave of court ('encl 476');

(39) on 20 April 2009 the liquidators convened a fourth meeting of the contributories to formally determine the views of the contributories as to whether the sale of the KJCFB shares to Can-One should be proceeded with. At this meeting, all the contributories voted to abort the sale of the shares to Can-One;

(40) on 5 May 2009 the liquidators filed an application of directions under s 237(3) of the Act seeking the court's direction as to whether to proceed with the sale of the KJCFB shares to Can-One (encl 485);

(41) on 6 May 2009 the minority contributories filed an application for an order to strike out the leave application of the majority contributories (encl 497);

(42) on 16 June 2009 Gold Pomelo, the losing bidder in the 2008 tender exercise filed a notice of motion to set aside Can-One's bid at RM1.65 per share and to secure the sale at the lower price of RM1.55 per share (encl 506); and

(43) Can-One filed the following notices of motion:

(i) on 6 May 2009 to intervene in and oppose the leave application of the majority contributories, as the 505 Suit is an abuse of process to frustrate the sale of the shares to Can-One (encl 493);

(ii) on 15 May 2009 to intervene in and, inter alia, for a direction that the liquidators proceed with the Can-One agreement; and

(iii) on 30 June 2009 to intervene and to oppose Gold Pomelo's application.

FINDINGS OF THE HIGH COURT

[7] The learned judicial commissioner dismissed the leave application with consequential orders dismissing Gold Pomelo's application and issued a direction under the directions application for the liquidators to complete the Can-One agreement. Consequently, Can-One's application to oppose the directions application was dismissed, but directed the liquidators to proceed with the Can-One agreement. In so doing, the learned judicial commissioner found no merit in the allegations of breach of fiduciary duties, conflict of interest and impropriety raised against the liquidators.

A FINDINGS OF THE COURT OF APPEAL

[8] The Court of Appeal allowed the appeals against the decision of the High Court by the respective parties except for the appeals by Gold Pomelo and made the following orders:

B

(a) set aside, unless expressly excluded, all orders of the learned judicial commissioner and that all further applications be heard by another judge;

(b) granted leave to the majority contributories in encl 476 (the leave application) to proceed with action against the liquidators. Consequently the Court of Appeal dismissed encl 497 by the minority contributories to strike out encl 476 and dismissed encl 493 by Can-One opposing encl 476. It is to be noted that the Court of Appeal effectively granted retrospective leave to the majority contributories to proceed with the 505 Suit against the liquidators, which incidentally had been struck out by the High Court on 1 September 2009 and is currently pending appeal before the Court of Appeal by way of Civil Appeal No W-02–2156 of 2011;

C

D

(c) dismissed the liquidators' directions application in encl 485 and set aside the direction to complete the sale of the said shares. The Court of Appeal therefore dismissed the preliminary objection that directions given under s 237(3) of the Act are not appealable;

E

(d) dismissed Can-One's motion in encl 500 and set aside the direction to the liquidators to complete the sale with Can-One;

F

(e) affirmed the order of the learned judicial commissioner granting leave to Can-One to intervene in encl 476 (the leave application); and

(f) allowed enclosure 506 for Gold Pomelo to intervene in encl 485 (the directions application) but dismissed prayers 2–7 and 8 of encl 506 wherein dismissing the prayer to invalidate the award of the said shares to Can-One, refusing to direct the liquidators to accept Gold Pomelo's bid and refusing leave to commence legal action against the liquidators, KPMG, KCSSB and Can-One.

G

H DECISION

[9] There are a number of questions posed and various grounds raised for which this court granted leave to appeal, each of which are set out in the appellant's memorandum of appeal. We shall first deal with the leave application (encl 476).

I

[10] The Court of Appeal in reversing the decision of the High Court granted leave to proceed with the 505 Suit. The 505 Suit was commenced in

the name of the majority contributories and not in the name of the company. We are of the view the correct position as rightly found by the learned judicial commissioner is that no leave ought to have been granted as no cause of action is vested in the majority contributories, in particular, as no pecuniary loss was suffered by the company and a strong prima facie case was not shown.

NO PECUNIARY LOSS

[11] For leave to be granted to proceed with the 505 Suit pecuniary loss must be shown, otherwise the action would be a waste of time and costs. On this point in the case of *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2007] 3 MLJ 571 at p 581; [2007] 7 CLJ 516 at p 532 it was held that in an application for leave to commence proceedings for, inter alia, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company.

[12] It is our considered view that the Court of Appeal erred in granting leave to proceed with the 505 Suit as no pecuniary loss has been shown by accepting the Can-One offer. This is because Can-One's offer was the highest: RM241,116,975, when compared to Gold Pomelo's offer of RM206,615,000.

[13] The Court of Appeal, in relying on *Attorney General v Blake* [2001] AC 268 and *Aberdeen Rail Co v Blaikie Brothers* [1843-60] All ER Rep 249 held that it is entirely irrelevant whether any loss was suffered by the company. However, it is to be noted that the cases of *AG v Blake* and *Aberdeen Rail Co* are distinguishable on the facts. Firstly they do not deal with the test for leave to commence proceeding against a liquidator. Secondly, these are cases relating to trustees and fiduciaries making an unauthorised profit, wherein at p 393, Lord Nicholls of Birkenhead, said:

> I should refer briefly to breach of trust and breach of fiduciary duty. Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. *To this end they must not make any unauthorised profit. If they do, they are accountable.* Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant. (Emphasis added.)

NO CAUSE OF ACTION

[14] In any event we find that there is no cause of action vested in the majority contributories. The complaint was that the sale of the company's share was improperly conducted and accordingly, any loss suffered is in fact suffered by the company. The proper plaintiff is the company and although the

liquidators control the company, the majority contributories may obtain an order from the winding up court allowing conduct of the action (see the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 3 CLJ 785(FC)). The need for such an order stems from the proper plaintiff's rule which provides that the company is the only person who may sue even if a share holder may benefit (see the case of *Christianos v Aloridge* (1995) 13 ACLC 1851 at p 1857). The majority contributories should have taken this cause of action which they failed to do so.

NO PRIMA FACIE CASE

[15] In order to succeed for the granting of leave the majority contributories must also make out a prima facie case, a standard to protect the court's officer and the winding up process (see the cases of *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd* [2007] 3 MLJ 571; [2007] 7 CLJ 516; *TN Metal Industries Sdn Bhd v Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 1 LNS 320 and *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584. These cases show that in applying the test the court is compelled to evaluate the evidence led to determine whether the test is met. In *Mamone and another v Pantzer* (2001) 36 ACSR 743, it was held that prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit.

EVALUATION OF THE EVIDENCE

[16] The basis of the claim by the majority contributories against the liquidators is centred on three main areas as follows:

(a) Can-One had no valid offer for the liquidators to accept;

(b) the liquidators were in conflict of interest in awarding the sale to Can-One, an audit client of KPMG; and

(c) one of the liquidators, Ooi Woon Chee had solicited an illegal gratification.

[17] It is our judgment that the learned judicial commissioner had rightly embarked on an evaluation of the evidence and had correctly held that the above claims of the majority contributories have no merit.

[18] As regards the claim of the majority contributories that Can-One had no valid offer for the liquidators to accept, we are of the view the liquidators were perfectly entitled to accept the offer. The Court of Appeal held that there was an open question as to whether there was a valid offer from Can-One, which the liquidators ought not to have entertained. The Court of Appeal

noted that Can-One's initial offer was to buy the assets of KJCFB which was only revised to an offer to buy the said shares after expiry of the deadline.

[19] In our view the Court of Appeal erred in concluding that there were yet questions as to the validity of the offer from Can-One. This is because the bid terms and the common law powers allow the liquidators to vary the said bid terms so as to consider Can-One's offer as correctly held by the learned judicial commissioner. The validity of any bid for the sale of assets of a company in liquidation by the liquidators of any incidental questions as to the capacity of the bidder, the nature of the bid, the funding arrangement, the tender procedure and deadline for submission of bids, are matters of discretion for the liquidators whether provided for in the bid terms or otherwise. It is not open to the contributories or any bidder to question or challenge the tender process after the tender sale had been concluded.

[20] As regards the extension of time relating to Can-One's offer in this case the tender was governed by the memorandum which provides that under s 2 of the memorandum the liquidators (for the vendor) could extend time and had the discretion at any time, without giving advance notice, to change or terminate the procedures for the sales. Also under s 6 of the memorandum the liquidators had the absolute discretion to deal with any selected person and/or to exclude any person from the process and to evaluate and reject any offer with no obligation to accept any particular offer, whether or not the offer was the highest. We are of the considered view as such, the liquidators under the memorandum, which all bidders agreed to be bound by had the discretion to extend time and entertain any offer.

[21] As regards the allegation that Can-One's offers should be rejected outright on 19 January 2009 as it failed to provide any financing documentation we find this is without merit. Again, the memorandum clearly provides that the liquidators had the discretion to consider any offer submitted. The absence of any written letters of financial support as of 30 April 2009 did not mean that Can-One had no financial capability. Can-One is a subsidiary of a company listed on Bursa Malaysia. It paid the RM5m earnest deposit and by the date of the Can-One agreement, it paid a forfeitable deposit of RM24,111,697.50. This is a matter of judgment for the liquidator. Financing documentation was not a pre-requisite for the offer to be considered. The liquidators have the discretion to evaluate Can-One's bid and its financial capacity. In *Re Mineral Securities Australia* [1973] 2 NSWLR 207 Street CJ in response to the allegation that the liquidator failed to recognise the risk of the purchaser being unable to pay said at p 237:

> I am satisfied on the evidence that he did make proper inquiries and give proper consideration to the elements or risk that would inevitably be attendant upon a transaction of this nature. Of course, the easiest way and the most certain way of

disposing the shares would have been simply to put them out on the market. Inevitably there is not be weighed against the sacrifice which must be made to achieve certainty by these means the elements of risk involved in negotiating a more complex disposal of the shares with a view to achieving a more satisfactory result for creditors. This is the task that rests upon the liquidator and, once again, I ask: Who is to say that he was wrong in the assessment that he made? Events over the next few years may prove him right, or wrong. But his conduct must be judged in the light of the situation existing at the time of the negotiations. I do not regard this head of criticism as having been substantiated.

[22] In any event, we find that there was no bad faith on the part of the liquidators exercising their discretion under the memorandum. They took the steps complained of to secure and did secure a higher price. As at 20 February 2009, Can-One's offer was the highest: RM241,116,975, being RM34.5m higher than Gold Pomelo's offer of RM206,615,000. It was in the best interest of the company and the contributories to accept Can-One's offer. It would be absurd to suggest that the liquidators reject the higher bid in favour of a lower bid.

[23] It is to be noted that Can-One merely revised their offer submitted on 19 January 2009 by reducing the number of the KJCFB shares to be acquired. Notwithstanding that Can-One's offer far exceeded Gold Pomelo's offer, it is unreasonable for Gold Pomelo to complain about Can-One's revising their offers when in the 2007 sale Dato' See also revised its offer reducing the number of KJCFB shares to be purchased after the deadline for submission of 4 September 2007. In the current tender, Gold Pomelo also revised their offer on 6 February 2009 after the deadline on 19 January 2009. The allegation that the liquidators were determined to award the sale to Can-One by unlawfully amending the procedure therefore has no merit as Dato' See and Gold Pomelo were given opportunities to improve their offer.

CONFLICT OF INTEREST

[24] On the issue of conflict of interest the complaint of the contributories is that the liquidators, KPMG Corporate Services Sdn Bhd ('KCSSB') and KPMG (a firm) placed themselves in a position of conflict when the liquidators accepted the tender from Can-One as Can-One and its holding company are audit clients of KPMG and the liquidators are partners of KPMG. Hence, it is said that the liquidators are disqualified from considering and awarding the tender to Can-One.

[25] It is trite that the correct principle with respect to conflict of interest in the case of liquidators are as set out in *McPherson's Law of Company Liquidation* (at para 8.120). The guiding principle is that the liquidator must be

independent and be seen to be independent. In other words, there cannot be an actual or apparent conflict. The Court of Appeal held that the liquidators should not have been appointed in 1996 given that Can-One was a client of KPMG, a firm of accountants in which the liquidators were partners. The only basis of the disqualification was that Can-One was a bidder in the tender exercise some 12 years later in 2008. With respect we are of the view it is impossible for the liquidators to have foreseen that Can-One would have been a bidder in a tender conducted by them 12 years after their appointment.

[26] To constitute an actual conflict there must be another partner advising Can-One on the very sale itself in the opposite interest (see the case of *Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222). In the present case there was no one from KPMG or connected with the liquidators advising Can-One. KPMG only acted on the audit of Can-One which did not involve advising in the opposite interest on the sale by the liquidators. There is no connection between the sale and the audit. It is our considered view that there is therefore no actual conflict at all.

[27] On apparent conflict the correct approach is as set out in *Advance Housing Pty Ltd (in liq) v Newcastle Classic Development Pty Ltd* (1994) 14 ACSR 230 at p 233:

> In performing his functions the liquidator must both be and appear to be independent and impartial of the creditors; *Re Intercontinental Properties Pty Ltd (in liq)* (1977) 12 ACLR 488 at pp 491–2
>
> (after citing from *Re Chevron Furnishers Pty Ltd*, the court held:)
>
> … If the foregoing statement were taken as precluding any association, it being in the circumstances obiter, then even the most limited prior involvement with the company in liquidation could disqualify the relevant firm of accountants from providing one of its partners as liquidator. In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance.

[28] Apparent conflict is said to arise in the present case because of the connection between the liquidators who are partners in KPMG operating out of KL/Selangor, and KPMG's Penang branch who were the auditors of Can-One at the nominal fee of RM1,000 per year for Can-One. The question is whether this limited connection between the liquidators who are personally

appointed under statute and the auditors in Penang (KPMG) gives rise to a reasonable apprehension of lack of impartiality on the liquidator's part. We are of the view the commercial reality is that large accounting practices will give rise to associations with persons whom insolvency practitioners will sell assets to. For example invitations to bid for assets are commonly 'open bids' through newspaper advertisements. All persons are invited to bid. It is inevitable that someone with an affiliation to large accountancy practices in which the liquidators are partners may submit bids. To disqualify a liquidator merely because of an audit relationship would mean that almost every large accounting firm would be disqualified from holding a tender exercise. It is inevitable that some audit client may be a bidder.

[29] Commercial reality dictates that the existence of such relationship by itself should not disqualify liquidators or their audit clients. There is no express prohibition by the winding up legislation. Can-One is not precluded from participating in the sale. Under r 144 of the Companies (Winding–Up) Rules 1972 the only parties that are precluded from purchasing the company's assets are the liquidators and members of the committee of inspection (without leave of court). In *Pongrass Group Operations Pty Ltd v Lowerpinems Pty Ltd* (1994) 15 ACSR 341 with respect to the appointment of the liquidators and possible conflict, the court ruled:

> … the evidence of relationship between a senior partner of Ferrier Hodgson and the Pongrass family who are associated with creditors of the company does not seem sufficient to impair the capacity of another member of the firm to perform and be seen to perform his duties as liquidator … it is necessary to carefully take into account that fact that Ferrier Hodgson undertook a review of (the subsidiary of the company). However there is no evidence that (the nominated liquidator) participated in the review. Even if he had, it would have been necessary to analyse matters such as the nature of his involvement to determine whether should be disqualified by reason of that prior association.

[30] Still on the issue of appointment of liquidators and possible conflict in the Canadian case of *Cobrico Development Inc v Tucker Industries Inc* 2000 ABQB 766 it was held that:

> With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers, are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of realisation on assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver. However, generally that does not constitute a

> conflict of interest nor generally does the marketplace of potential advisor or of potential purchasers have any legal standing to interfere with the performance of the receiver.

[31] In our view the case of *Cobrico* is directly applicable to the present case. In *Cobrico* the appointment of the auction house was criticised because the receiver's firm was the auditor of the auction house in the same way as the liquidators' firm is the auditor of Can-One. The learned judicial commissioner in the present case had rightly applied the principle in *Cobrico* to dismiss the challenge.

NON-DISCLOSURE OF CAN-ONE'S PARTICIPATION

[32] We are of the view there is no obligation to disclose the participation of Can-One in the 2008 sale. There is also no obligation on the liquidators to disclose the identity of the parties submitting the offers. The 2008 tender documents do not provide for such obligation. On this point in *Cape v Redarb Pty Ltd* (1992) 8 ACSR 67 at p 80, the Supreme Court in Australia (in the analogous case of receivers) had this to say:

> Whether the receiver was bound to accept only 'open' offers, that is, offers known to each beneficiary, is a more difficult question. I do not think the receiver was necessarily so bound. It was not a case where the receiver was acting as agent for (the beneficiaries). He did not need their approval to sell assets. He could seek advice. He might seek court approval. He was however, not bound to get instructions from (the beneficiaries) before selling assets.

[33] It is to be noted that given that these shares are of a listed company, it would appear that the identity of the offerors and the offer price would be price sensitive and hence had to be dealt with extreme care. Bidders with such knowledge may engage in submitting biased offers for the KJCFB shares which would be detrimental to the sale process, in particular where the contributories are allowed to bid.

STANDARDS OF A JUDGE

[34] The Court of Appeal held that the liquidators as officers of the court are expected to abide by the same standards as judges. As such, they cannot hold meetings in connection with a bid outside their offices. On this point we are of the view the Court of Appeal clearly erred as in exercising a power of sale, liquidators do not exercise judicial or quasi-judicial functions. Accordingly, the standards applicable to a judge have no application to liquidators on the sale of assets. In selling assets, the liquidators do not act in a judicial capacity nor in an

adjudicative role. Instead, the liquidators were required to make business decisions on the benefits and burdens of the sale and to obtain the highest possible price.

[35] In *Re Timberland* (1979) 4 ACLR 259 the quasi-judicial standard of behaviour was applied to a liquidator on adjudicating a proof of debt. The case was explained however in *Re Chevron Furnishers Pty Ltd* (1993) 12 ACSR 565:

> That asserted identity between the position of a judge and that of the liquidator was based, on the observation of Marks J in *Commission for Corporate Affairs v Harvey* [1980] VR 669 at p 696.
>
> That passage, so the argument went, was approved by a majority of the High Court in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332. But a careful reading of the judgments, particularly that of Brennan and Dawson JJ, establishes a significant limitation thereon. At pp 338–9 their Honours said: 'In determining whether to admit or reject a proof of debt, a liquidator has been said to act in a quasi-judicial capacity *Re Britton and Millard Ltd* [1957] 107 LJ 6011 according to standards no less than the standards of a court or judge: *Commission for Corporate Affairs v Harvey* [1980] VR 669 at p 696. *But as was pointed out at p 341 a liquidator is not always in the course of a winding up acting in a quasi-judicial capacity. The role of a liouidator includes carrying out many administrative and investigative tasks …* (Emphasis added.)

[36] That the standards of a judge are not applied to liquidators is put beyond doubt in *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612 wherein at p 643 it was held:

> As can be seen from the passage I have quoted, some cases have emphasised in enunciating the principles of independence and impartiality, that a court-appointed liquidator is an officer of the court. In *Re Timberland Ltd* [1980] VR 669: [1979] 4 ACLR 259. Marks J said that in some respects a liquidator is in the same position as a judge. Thus, a liquidator acts in a quasi-judicial capacity in determining whether to admit or reject a proof of debt, and must act according to standards no less than the standards of a court or judge: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at pp 338–9, 91 ALR 180 at p 184: 1 ACSR 510 at p 514 per Brennan and Dawson JJ. It may be that the duties of independence and impartiality are rooted in this curial analogy. *In some respects (for example, in selling assets or running a business of the company in liquidation) the liquidator can hardly be said to be acting quasi-judicially.* (Emphasis added.)

[37] Further, it would be to ignore commercial reality to impose upon a liquidator the standards of a judge when selling assets. In selling assets, the liquidator is obliged to make business decisions and to the best possible price; he is obliged to enter into the market and to use all powers to get that price. It would be wholly unrealistic to expect him to sit in his office in the expectation of competitive bids to come streaming in. The courts have accepted that a

liquidator is not bound to remain and conduct meetings with bidders in his offices. In *Re Mineral Securities Australia* an Australian liquidator travelled to United States, England and Hong Kong to meet potential bidders. As such, the liquidators as in the present case are more than entitled to meet outside their offices to ensure that the highest price is obtained.

THE ALLEGED BRIBE AND SOLICITATION

[38] We find that no bribe was ever paid. It is the alleged solicitation for the bribe that is the complaint. The solicitation to Gold Pomelo had no nexus or effect on the acceptance of the highest bid by Can-One and caused no loss to company. In the absence of the solicitation tainting the Can-One agreement, the allegation even if true can have no effect on the validity of the said agreement and whether or not it should be completed. On this point in *Moody v Cox and Hatt* [1917] 2 Ch 71 it was held at pp 87–88:

> … I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in *Dering v Earl of Winchelsea* (1) which has been referred to show that equity will not apply the principle about clear hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bride has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bride. Therefore that point, which was argued with great strenuousness by counsel for the defendant Hatt, appears to me to fail, and we have to consider the merits of the case.

[39] We are of the view the Court of Appeal erred in law in holding that serious questions have been raised about the alleged secret meetings and illegal gratification solicited by one of the liquidators, and must be investigated and answered. There is no effect on the award to Can-One.

[40] The crux of the complaint made by the respondents is that the liquidators requested for a secret meeting with Jason See on 24 January 2009 and on 2 February 2009 for the purpose of soliciting gratification from Dato' See to sell the shares at between RM1.50 to RM1.58. However the liquidators contended that the meeting on 24 January 2009 was requested by Jason See further to the meeting on 23 January 2009 to deliver a letter from Gold Pomelo dated 24 January 2009 to the liquidators, declining to raise their offer to RM1.68 per KJCFB share. The meeting on 2 February 2009 was initiated by Jason See to inform the liquidators that Gold Pomelo was considering making a revised offer of RM1.55 per share. It did make the offer on 6 February 2009.

[41] Jason See and Dato' See said that they were astonished and disgusted by the solicitation. But no complaint was made by Jason See and/or Dato' See after the first alleged secret meeting on 24 January 2009. There is no quantum stipulated for the 'illegal gratification' sought. Instead, Jason See requested for and met with the liquidators again on 2 February 2009 and 6 February 2009. In addition, Gold Pomelo proceeded to revise its offer price to RM1.55 per share and submitted the revised offer on 6 February 2009. The complaint of improper conduct and fraud was only made on 2 March 2009 and 3 March 2009 (approximately a month later), after the announcement that Can-One was awarded the sale.

[42] For the reasons abovestated it is our considered view the learned judicial commissioner had rightly held that the allegation of solicitation is devoid of merit.

BREACH OF FIDUCIARY DUTY

[43] On the question of whether KPMG and KCSSB owed a fiduciary duty to the contributories, the learned judicial commissioner said this:

> It cannot be underscored sufficiently that Ooi Woon Chee and Ng Kim Tuck were personally appointed as liquidators for the company. The distinction between these individuals and KPMG and KCSSB is crucial in analysing the allegations of a conflict of interest. Such distinction cannot be blurred or obscured so as to bring KPMG and KCSSB into the 2008 Sale, or to impose fiduciary positions onto these entities. The fact that the individuals are partners in those entities does not allow for such confusion.

[44] We are of the view the Court of Appeal erred in finding that KPMG and KCSSB owed a duty to the contributories. It was held that they were vehicles and owed duties to the contributories notwithstanding that the appointment of the liquidators are personal under the Act. KPMG and KCSSB could never be liquidators or liable for the liquidators. A company or a firm cannot be appointed as liquidators. In *Re Sankey Furniture Ltd ex parte Harding* [1995] 2 BCLC 594 at pp 600–601, it was held:

> The 1986 Act provides that a person who is not an individual cannot be qualified to act as an insolvency practitioner (see s 390(1)). A person who acts as an insolvency practitioner at a time when he is not qualified to do so commits an offence (see s 389(1)). The effect is that in law, appointment as a liquidator or trustee in bankruptcy is an appointment which is personal to the individual who accepts it. It is not an appointment to the firm of which he or she happens, for the time being to be a member. But in large firms containing a number of partners and employees who are qualified as insolvency practitioners it is not unlikely that the work comes to the firm rather than to the individual. It is the collective expertise of the firm which attracts the appointment. As both Mr Betts and Mr Harding recognise, the

> day-to-day administration is carried out by employees of the firm. In these circumstances it may well be that the firm, and perhaps also the creditors, regard the identity of the individual in whose name the appointment is held as relatively unimportant The appointment 'belongs' to the firm, and if the individual leaves the firm he should not take the appointment with him.
>
> The view which I have described in the preceding paragraph may or may not be widely held. It is, I think, reflected in the applications which are before me. It is likely to accord with commercial reality. But it does not accord with the relevant provisions in the 1986 Act. The Act could have made provision for the appointment of a firm or partnership to the office of liquidator or trustee in bankruptcy.

On the other hand a liquidator may always appoint servants and/or agents (see s 236(2)(i) of the Companies Act). They are frequently the employees of the firm.

[45] KPMG and KCSSB are not vehicles used by the liquidators so as to be liable for the alleged unlawful and fraudulent acts of the liquidators. On this point in *Ramsey v Leonard Curtis (a firm)* [1999] All ER (D) 891 it was held:

> There was no tenable legal basis for suing the firm. Only the individual partners appointed could be administrative receivers.
>
> On the fact of it, the writ complied. It certainly 'alleged' that all partners were liable. But when fleshed out by first, the statement of claim and second, the claimants' first skeleton argument before the district judge, it became clear that it had no legal foundation. This claim, as set out in the statement of claim, assumes that the partnership was liable, directly or vicariously, for the breaches of contract of the administrative receivers. For this to be so, the administrative receivers would have to be liable as partners. And their liability was personal. They had no liability as partners. Nor were their partners vicariously liable for the administrative receivers' actions. The claim as pleaded disclosed no cause of action, and was doomed to strike-out unless amended. The claim was based on a total and fundamental legal misconception.

[46] KPMG as a firm of accountants and KCSSB as a company, were never appointed as the liquidators of the company. The appointment of the liquidators under the order dated 30 January 1996 was personal. The liquidators are perfectly entitled to appoint KCSSB as an agent to assist in the liquidation.

[47] For all the reasons mentioned above it is our judgment that the learned judicial commissioner came to a right decision in dismissing encl 476.

THE DIRECTIONS APPLICATIONS (ENCL 485)

[48] We shall now deal with the directions application (encl 485). Section 237(3) of the Act provides that:

> The Liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

Enclosure 485 seeks the court's direction as to whether the liquidators ought to follow the wishes of the contributories and to abort the completion of the Can-One agreement; or complete the sale as the termination of the sale would seem to be unfair to Can-One.

[49] It is our considered view these are directions bona fide requested for by the liquidators. The learned judicial commissioner was in no doubt when she said, inter alia, that it appears to this court that this is precisely the sort of case in which such guidance and directions should be afforded.

[50] Where there are conflicting duties of the liquidator, which places the liquidators in an intolerable position, in our view the proper way is to obtain the directions of the court (see the case of *Re Statewide Investments Ltd (in liq)* (1981) 6 ACLR 265). Whatever decision to be made by the liquidators whether to proceed or not with the sale will be criticised by the contributories or Can-One. It is proper for the court to give directions where the liquidators' proposed decision is being criticised or when they, the liquidators have been confronted with charges of acting unreasonably(see the case of *Sanderson v Classic Car Insurances Pty Ltd* (1986) 4 ACLC 114). Given the filing of the 505 Suit against the liquidators in relation to the sale, it is proper for the liquidators to inform the court and to take directions.

[51] This request for directions must also be viewed against the factual matrix of the case whereby for 15 years after the company was wound up, the liquidators have been impeded from completing the winding up of the company by proceedings commenced by the contributories. This cannot go on forever and the liquidators are desirous of obtaining court's directions in respect of the completion of the liquidation. It must be stated here that the liquidators are under a statutory duty to bring the winding up of the company to an early conclusion and this is an important policy consideration behind the winding up provisions. On this point in *Re House Property and Investment Co Ltd* [1954] Ch 567 at p 612 it was held:

> … the policy of the Act as expressed in s 302, carries the implication that he has to deal with the liabilities within a reasonable time. I imply those words in s 302 from the general policy of the Act. Parliament cannot have contemplated for 999 years.

[52] It is also our considered view that the Court of Appeal erred in failing to find that the directions given by the learned judicial commissioner under s 237(3) of the Act were in the nature of advice and is accordingly not a judgment or order within the scope of s 67(1) of the Courts of Judicature Act

1964 ('the CJA 1964') and are thereby non-appealable. An appeal to the Court of Appeal only lies from a judgment or order within s 67(1) of the CJA 1964 which provides:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter …

[53] We are of the view a direction or advice given under s 237(3) of the Act is not a judgment or order. In *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270, the court in considering the nature of application for directions under s 379(3) of the Companies (Queensland) Code which is similar to our s 237(3) of the Act held at p 1273 that a direction given under similar provisions is not a 'judgment' or 'order'. The court followed *Blackcbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14 wherein it was held:

> That sub-s (s 237(3)) does not, in my opinion enable the court to make binding orders on persons in the nature of judgments. The directions which a court may give on an application under it are more like the directions or advice which may be given under s 45 of the Trustees and the Executors Acts. Such directions are not in my opinion, subject to appeal. (*Re Tooth's Trusts* [1877] 5 QSCR 10). I have set out these views on s 237(3) because it was contended that the decision of WB Campbell J created an estoppels between the parties. But there was no judgment and no order. In my opinion there was no estoppels. Nor was there any right of appeal.

[54] The rationale or the purpose of s 237(3) of the Act is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several Australian decisions. In *Re Security Provident Fund Limited (in liq); Rodger v Gourlay* (1984) 2 ACLC 594 at p 595 the Australian Supreme Court ruled that:

> The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that sub-s 379(3) does not enable the court to make binding orders in the nature of judgment.
>
> The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation; …

In *Re JW Murphy & PC Allen* (1996) ACSR 569, the Supreme Court of New South Wales held at p 570:

> an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up.

[55] As encl 485 direction is only an administrative proceeding by way of advice, any direction given is not a judgment or order and therefore does not fall within s 67 of the CJA 1964. It is our judgment therefore that the directions given by the learned judicial commissioner in encl 485 are non-appealable.

CONCLUSION

[56] For the reasons abovestated the appeals by the appellants in Civil Appeal Nos 02–11 of 2011(W) and 02–12 of 2011(W) are allowed with costs. All the orders made by the Court of Appeal are hereby set aside and consequently all the orders made by the learned judicial commissioner are hereby restored. We award a sum RM300,000 to the appellant as against the first to the 14th respondents (the majority contributories) and a sum of RM200,000 as against the 15th to the 27th respondents (minority contributories) as costs before this court and at the Court of Appeal for both Civil Appeal Nos 02–11 of 2011(W) and 02–12 of 2011(W). The deposit is to be refunded to the appellants.

Appeals with costs.

Reported by Kohila Nesan